

Decision 05-10-012 October 6, 2005

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Pac-West Telecomm, Inc.,

Complainant,

vs.

AT&T Communications of California, Inc.,
Teleport Communications Group of San
Francisco, Teleport Communications Group of
Los Angeles, Teleport Communications Group of
San Diego,

Defendants.

Case 04-10-024
(Filed October 20, 2004)

ORDER EXTENDING STATUTORY DEADLINE

Public Utilities Code Section 1701.2(d) provides that adjudicatory matters such as this complaint case shall be resolved within 12 months after they are initiated, unless the Commission makes findings why that deadline cannot be met and issues an order extending the 12-month deadline. In this proceeding, the 12-month deadline for resolving the case is October 20, 2005. Although a Presiding Officer's Decision (POD) was served on the parties on September 19, 2005, it is possible that one of the parties will file an appeal of the POD pursuant to Rule 8.2 (c) of the Commission's Rules of Practice and Procedure, or that a Commissioner will file a request for review of the POD pursuant to Rule 8.2 (d). In the event an appeal is filed or review is sought, it will not be possible to resolve these matters by October 20, 2005. Because of this

possibility, it is appropriate to extend the 12-month deadline to give the Commission adequate time to consider an appeal or request for review.

A. Procedural Background

The complaint in this case alleged that AT&T Communications of California, Inc. and three of its subsidiaries (collectively, AT&T) had refused to pay Pac-West Telecomm, Inc. (Pac-West) the charges due for calls that AT&T originates for local exchange customers and routes to Pac-West through the tandem switches of the two principal California incumbent local exchange carriers (ILECs), Pacific Bell Telephone Company (Pacific) and Verizon California Inc. (Verizon).

The complaint noted that while Pac-West and AT&T each have interconnection agreements with Pacific and Verizon, they do not have an interconnection agreement with each other. In the absence of such an agreement, Pac-West contended that it was entitled to the termination charges set forth in its intrastate tariffs for traffic that originates with AT&T local exchange customers and is transmitted to Pac-West by the two ILECs. Pac-West alleged that AT&T has refused to pay any of the statements Pac-West has rendered for these charges, which now total over \$7 million. As relief, Pac-West asked not only that AT&T be ordered to pay all the charges for which it had been invoiced, but also to pay all future charges based on Pac-West's intrastate tariffs "unless and until the AT&T Companies enter into a direct interconnection agreement with Pac-West."

In its answer, AT&T contended that no charges were due. Since the overwhelming majority of the traffic that Pacific and Verizon transmit for AT&T to Pac-West was ultimately bound for Internet service providers (ISPs), AT&T argued, this case should be governed by the so-called "ISP Remand Order"

issued by the Federal Communications Commission (FCC) in April 2001.¹ In the ISP Remand Order, the FCC concluded that because of the regulatory arbitrage that had resulted from certain competitive local exchange carriers (CLECs) targeting ISPs as their customers (thus entitling these CLECs to substantial amounts of reciprocal compensation),² the FCC should use its authority to

¹ The technical citation for the ISP Remand Order is *Order on Remand and Report and Order*, CC Docket Nos. 96-98 and 99-68 (FCC 01-131), released April 27, 2001, 16 FCC Rcd 9151. In its pleadings, AT&T acknowledged that the United States Court of Appeals for the District of Columbia Circuit subsequently found that the statutory provision relied on by the FCC did not support the ISP Remand Order. However, AT&T noted, the D.C. Circuit remanded the order to the FCC for further consideration without vacating it. *Worldcom, Inc. v. FCC*, 288 F.3d 429, 434 (D.C. Cir 2002), *cert. denied sub nom. Core Communications, Inc. v. FCC*, 538 U.S. 1012 (2003). As a result of this unusual procedural posture, other courts (including the Ninth Circuit) have noted that the provisions of the ISP Remand Order remain in effect despite the D.C. Circuit's conclusions about the deficiencies in its statutory analysis. *See, e.g., Pacific Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1122-23 (9th Cir. 2003). In this order, the ISP Remand Order is sometimes referred to simply as the "Remand Order."

² Under § 251(b)(5) of the Telecommunications Act of 1996, each local exchange carrier has a "duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." In *Wisconsin Bell, Inc. v. Bie*, 216 F. Supp.2d 873 (W.D.Wisc. 2002), the district court explained reciprocal compensation arrangements -- and contrasted them with bill-and-keep arrangements -- as follows:

"As new entrants and incumbents have interconnected their local exchange networks, some calls originating on one carrier's network are completed, or 'terminated,' on another carrier's network. For example, if a customer of carrier A calls a customer of carrier B, the call originates on carrier A's equipment but terminates on carrier B's equipment. Absent a reciprocal compensation arrangement, carrier A would charge its customer for the call, but carrier B would receive no compensation for the use of its equipment in terminating the call. In a reciprocal compensation regime, carrier A pays carrier B on a per minute basis for terminating the local call. This insures that both carriers are compensated for local intercarrier calls. In contrast, under a 'bill-and-keep' arrangement, each

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preempt this area and require the affected carriers to make a three-year transition to a “bill and keep” compensation system, rather than allow the CLECs to continue reaping windfalls from the payment of reciprocal compensation.³

In its answer, AT&T placed particular reliance on ¶ 81 of the ISP Remand Order, which states that for carriers not having an interconnection agreement in effect on the issuance date of the ISP Remand Order (as AT&T and Pac-West did not), ISP-bound traffic must be exchanged on a bill-and-keep basis. AT&T concluded that since the ISP Remand Order preempted state law in this area (including any charges in intrastate tariffs), and since AT&T had met its obligation to exchange traffic on a bill-and-keep basis, it owed Pac-West nothing. AT&T also contended that as a CLEC rather than an ILEC, it had no obligation

carrier recovers from its own customers the costs of terminating calls that originate with other carriers.” (216 F. Supp.2d at 875-76.)

³ In the ISP Remand Order, after noting in ¶ 20 that reciprocal compensation had grown up because of the assumption that “traffic back and forth on . . . interconnected networks would be relatively balanced,” the FCC described the problem of regulatory arbitrage connected with ISPs as follows:

“Internet usage has distorted the traditional assumptions because traffic to an ISP flows exclusively in one direction, creating an opportunity for regulatory arbitrage and leading to uneconomical results. Because traffic to ISPs flows one way, so does money in a reciprocal compensation regime. It was not long before some LECs saw the opportunity to sign up ISPs as customers and collect, rather than pay, compensation because ISP modems do not generally call anyone in the exchange.” (ISP Remand Order ¶ 21; 16 FCC Rcd at 9162.)

To illustrate the magnitude of the arbitrage problem, ¶ 5 of the ISP Remand Order points to evidence that on average CLECs terminate 18 times more traffic than they originate, and that this imbalance results in “annual CLEC reciprocal compensation billings of approximately two billion dollars, ninety percent of which is for ISP-bound traffic.” (16 FCC Rcd at 9154-55.)

under the Telecommunications Act of 1996 to enter into an interconnection agreement with Pac-West. Thus, AT&T contended, the Commission should dismiss the complaint.

At a prehearing conference held on January 7, 2005, Pac-West and AT&T agreed that the case presented threshold legal issues, and suggested it would make sense to decide these issues before considering the question of what compensation Pac-West should receive in the event it prevailed on its liability theory. The assigned Administrative Law Judge (ALJ) ruled, however, that the parties would be required to submit testimony on the amount of compensation to which Pac-West would be entitled in the event it prevailed on liability at the same time the parties were briefing the legal issues raised by the ISP Remand Order. This schedule was set forth in the Scoping Memo issued by the ALJ and the assigned Commissioner, Susan P. Kennedy, on February 11, 2005.

Pursuant to the schedule in the scoping memo, Pac-West and AT&T filed opening briefs on the legal issues on February 11, 2005, and reply briefs on March 11, 2005. In its briefs, AT&T continued to argue that (1) by issuing the ISP Remand Order, the FCC had completely preempted pre-empted state law in this area, leaving no room for the application of intrastate tariffs, and (2) AT&T's obligations were governed by ¶ 81 of the Remand Order, which dictated that all of the ISP-bound traffic that AT&T exchanged with Pac-West should be exchanged on a bill-and-keep basis. In its briefs, Pac-West argued that AT&T was taking ¶ 81 out of context, because it was only one part of the "interim compensation plan" that the FCC had set forth in the Remand Order to deal with exchanges of ISP-bound traffic between ILECs and CLECs. Because Pac-West and AT&T were both CLECs, Pac-West continued, the provisions of the interim compensation plan – including ¶ 81 – were inapplicable, and the proper source

to consult for determining the compensation due Pac-West was the intrastate tariff it had filed to deal with cases in which Pac-West and the other CLEC had not entered into an interconnection agreement.

In addition to briefing these legal issues, Pac-West served testimony on compensation questions on March 7, 2005. AT&T moved to strike portions of this testimony on March 18, 2005. After an ALJ ruling denying the motion to strike without prejudice, AT&T served rebuttal testimony on April 1, 2005, and hearings on the compensation issues were held on April 12-13, 2005.

At the close of the hearings, the ALJ set dates for the filing of briefs on compensation issues. Pursuant to this schedule, the parties filed their opening briefs on May 11, 2005, and their reply briefs on compensation issues on June 1, 2005. On June 8, 2005, Pac-West filed a motion to set aside submission of the case so that an affidavit concerning a recent development could be received into evidence. AT&T filed an opposition to this motion on June 17, 2005, and Pac-West filed a reply on June 24, 2005. Because the POD concludes that it is unnecessary to decide the issues raised by Pac-West's June 8 motion, the POD deems that motion denied.

B. Issuance of the POD

Shortly after receipt of Pac-West's reply in support of its June 8, 2005 motion, the assigned ALJ began to draft the POD. As noted in the introduction, the POD was mailed to the parties on September 19, 2005. The POD concludes that under the ISP Remand Order, AT&T is not entitled to exchange traffic with Pac-West on a bill-and-keep basis, because even though the great majority of this traffic is "ISP-bound" within the meaning of the Remand Order, the interim compensation plan— including ¶ 81 on which AT&T relies — applies only to traffic

exchanged between ILECs and CLECs. Since Pac-West and AT&T are both CLECs, the interim compensation plan does not govern their traffic exchanges.

The POD also accepts Pac-West's argument that the most appropriate source to consult for determining the compensation Pac-West should receive for terminating traffic originating on AT&T's system is the intrastate tariff Pac-West has filed that sets forth the termination charges applicable to traffic originated by other CLECs with which Pac-West does not have an interconnection agreement. Finally, the POD concludes that because of (1) the substantial period of time that elapsed between AT&T's initial refusal to pay Pac-West's call termination invoices and the filing of the instant complaint, and (2) the fact that the termination charges in Pac-West's intrastate tariff are significantly greater than the ceilings set forth in the interim compensation plan in the ISP Remand Order, it is not appropriate to require AT&T to pay interest or late charges on \$7,115,014.16, the amount AT&T concedes it owes to Pac-West if the latter's intrastate tariff is adjudged to be applicable here.

C. Discussion

In light of the arguments made by AT&T and Pac-West, it is possible that one or both of them will file an appeal from the POD pursuant to Rule 8.2(c) of the Rules of Practice and Procedure. As noted above, the POD rejects AT&T's argument that the ISP-bound traffic it exchanges with Pac-West should be exchanged on a bill-and-keep basis, and holds that AT&T is liable for \$7,115,014.16, the amount reflected in the corrected invoices Pac-West has submitted to AT&T covering the period since 2001.⁴ On the other hand, since the

⁴ As noted in the POD, the amount that Pac-West initially sought in this case was approximately half of the amount it is now seeking. The difference was due to an error

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POD concludes that AT&T should not have to pay interest or late charges on this amount, despite the provisions of Pac-West's tariff, Pac-West may also be inclined to file an appeal. If either party files such an appeal, or if any Commissioner seeks review of the POD pursuant to Rule 8.2(d), the Commission will not be able to dispose of the appeal or request for review by October 20, 2005, the 12-month deadline applicable to this case by virtue of Pub. Util. Code § 1701.2(d).

Under these circumstances, it is appropriate to extend the one-year deadline. As noted above, the record in this case is substantial, encompassing not only the complex legal issues raised by the ISP Remand Order, but also factual issues about the nature of the traffic data maintained by AT&T and Pac-West that were explored in two days of hearings. Even though the presiding officer began work on the POD shortly after receipt of Pac-West's June 24, 2005 reply in support of its motion to set aside submission, it did not prove possible to serve the POD on the parties until September 19, 11 months after initiation of the case.

We note that in analogous situations where it was not certain the Commission would adopt a decision disposing of an adjudication matter with the 12-month period, the Commission has acted to extend the deadline pursuant to Pub. Util. Code § 1701.2(d). *See, e.g.*, Decision 04-01-023 (extending 12-month

in the billing software used by the company that prepared Pac-West's bills. As noted in the POD, while AT&T initially raised various defenses to Pac-West's claim for the higher amount, AT&T now concedes that it owes \$7,115,014.16 to Pac-West if the latter's intrastate tariff is deemed applicable in this case.

deadline to allow consideration of draft decision dismissing amended complaint). The same course of action is appropriate here.

D. Waiver of Comments on Draft Decision

Under Rule 77.7(f)(4) of the Commission's Rules of Practice and Procedure, the Commission may waive the otherwise-applicable 30-day period for public review and comment on a decision that extends the 12-month deadline set forth in Pub. Util. Code § 1701.2(d). Under the circumstances of this case, it is appropriate to waive the 30-day period for public review and comment.

E. Assignment of Proceeding

Susan P. Kennedy is the Assigned Commissioner and A. Kirk McKenzie is the assigned ALJ and presiding officer in this proceeding.

Findings of Fact

1. The complaint in this case was filed on October 20, 2004.
2. Pursuant to the joint ruling and scoping memo issued in this case on February 14, 2005, the parties filed their opening briefs on the legal issues raised by the ISP Remand Order on February 11, 2005, and their reply briefs on March 11, 2005.
3. As provided for in the joint ruling and scoping memo, Pac-West filed testimony on compensation issues on March 7, 2005.
4. Pursuant to an ALJ ruling, AT&T filed rebuttal testimony on compensation issues on April 1, 2005.
5. A hearing on the compensation issues was held on April 12-13, 2005.
6. Pursuant to the schedule established by the assigned ALJ at the compensation hearing, both parties filed their opening briefs on compensation issues on May 11, 2005, and reply briefs on June 1, 2005.

7. On June 8, 2005, Pac-West filed a motion to set aside submission of the case to receive additional evidence. AT&T filed an opposition to this motion on June 17, 2005, and Pac-West filed a reply in support of the motion on June 24, 2005.

8. The POD was mailed to the parties herein on September 19, 2005.

9. Because the POD rules against AT&T on the issues it raised in connection with the ISP Remand Order, it is possible that AT&T will seek review of the POD pursuant to Rule 8.2 (c).

10. Because the POD denies Pac-West's request that interest and late charges be added to the amount that the POD awards to Pac-West, it is possible that Pac-West will seek review of the POD pursuant to Rule 8.2(c).

11. It is possible that a Commissioner may seek review of the POD pursuant to Rule 8.2(d).

Conclusions of Law

1. In the event that a timely appeal of the POD or a request for review of it is filed, it will not be possible to resolve this case within the 12-month period provided for in Pub. Util. Code § 1701.2(d).

2. The 12-month statutory deadline should be extended until this proceeding is resolved.

O R D E R

IT IS ORDERED that the 12-month statutory deadline in this proceeding, October 20, 2005, is extended until further order.

This order is effective today.

Dated October 6, 2005, at Los Angeles, California.

MICHAEL R. PEEVEY

President
GEOFFREY F. BROWN
SUSAN P. KENNEDY
DIAN M. GRUENEICH
Commissioners

Commissioner John A. Bohn, being necessarily absent,
did not participate.